Supreme Court of the United States

NO. 199 - OCTOBER TERM, 1951

BRUNO A. KOEHLER, AND HUGO W. ACKERMANN,
PETITIONERS

versus

THE UNITED STATES OF AMERICA,
RESPONDENT

MOTION FOR REHEARING ON PETITION FOR CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOTION FOR REHEARING

Now comes Bruno A. Koehler and Hugo W. Ackermann and here now move the Court to reconsider their petition for Writ of Certiorari to review a judgement entered in this Cause on May 25, 1951, on which Petitioner's Motion for rehearing was denied on June 25, 1951, by the United States Court of Appeals for the Fifth Circuit.

Your petitioners again re-urge each of the questions presented, in their original petition which are as follows:

The exact questions presented are these:

1. Does the action of an officer, whose authority to act under the provisions of the state laws is not put into operation by the facts as presented before the Court, and who inflicts an assault and battery upon a person whom he later treats as a prisoner, constitute a violation of Sec. 242 of Title 18, or is such action the individual act of the officer?

2. Does the instruction to the jury, which charges first that intent may not be presumed by the jury. (Sec. 242, requiring wilful deprivation of Civil Rights) and then further charging the jury that it is a well settled rule of law, which applies to both civil and criminal cases, that intent is presumed and inferred from the result of the action, give the jury a correct charge of the law by which to determine the Petitioners' guilt or innocence?

3. The Court should have sustained the Motion of Petitioners for an Acquittal because the evidence before the Court failed to show that the acts of the Petitioners were not the result of their individual action in their personal pursuit.

4. The count of the information charging an offense under Sec. 242 of Title 18 is subject to be quashed and dismissed when the same fails to allege and inform the Defendants, (your Petitioners) regarding the manner of or allege the authority which Petitioners claim was granted to them by the State of Texas, which authorizes and excuses their conduct.

5. The count of the information charging a conspiracy to violate Section 242 of Title 18 must also allege by what state authority the Petitioners' excuse their actions as authorized by powers granted to them by the State of Texas.

6. The question as to whether or not in the case herein the Government relies upon the acts of the Defendants alone to shown a conspiracy to have been in existance, and wherein the Defendants request a charge on circumstantial evidence, however, which charge may have been deficient, but since the Court did not charge the law of circumstantial evidence, were the Defendants then, after their request, entitled to have the Court fully charge on the law of circumstantial evidence?

In addition to the matters presented to support their original petition, your petitioners would show to the Court the following additional reasons for the granting of this writ.

Mr. Justice Jackson in his dissenting memorandum points out that when ever a charge of a trial court tells the jury that they can convict an accused upon a presumption, instead of requiring the government to produce evidence and meet the burden of proof heretofore required of the government, *that such would constitute the importation of a novel, and uppermost, a dangerous principal of law.*

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Your petitioners note with great interest the views of the meaning of a denial of a petition for certiorari by your body, which Mr. Justice Frankfurter set out in *Maryland v. Baltimore Radio Show, Inc.* 338 U. S. 912. There Mr. Justice Frankfurter declares that the denial does not mean that your body agrees with the holdings of the Court below.

Now in this connection your petitioners would like to call to the attention of the Court the effect of such matters upon the Justice Department of our Government by quoting the brief of the United States in the Court below, which reads:

> "Fortunately, with respect to appellants' belief that the circumstantial evidence charge was required because the element of wilfulness was unsupported by direct evidence, extensive argument is not required to dispose of this contention. In *Crews v. United States*, 160 F. 2d 746, this Honorable Court sustained a conviction for an offense similar to that described in the Second Count of the instant case. In appeal of the Crews case, appellant's attorney on page 24 of his brief, stated:
>
> "Since it was permissible, indeed necessary, to determine the presence or absence of Crews' specific intent by circumstantial evidence, we thought, and still think, that our requested charge 19 (297) should have been given, because, as we stated when taking our exceptions, the familiar law of how and under what circumstances a relevant fact may be proved by circumstantial evidence is applicable to this request. The request was as follows:
>
> '19. The defendant's specific intent may be proved by circumstantial evidence. If it is proved

by circumstantial evidence alone, the evidence must be of such a nature as to exclude beyond a reasonable doubt every reasonable hypothesis except that in doing the acts alleged the defendant committed them with the intent of depriving McFadden of a constitutional right. If the evidence is reasonably susceptible of any other hypothesis, the defendant should be acquitted."'
This Honorable Court did not discuss in its opinion this contention of Crews, but the court did point, on page 750 to the existence of direct evidence in the case, and, on the same page, discussing the question of intent, made the familiar and well-established observation that:
"An officer of the law undoubtedly knows that a person arrested by him for an offense has the constitutional right to a trial under the law, and if the jury should believe from the evidence beyond a reasonable doubt that such an officer wilfully failed to accord to one arrested by him the opportunity for such a trial but substituted instead his own trial by ordeal, such jury would be justified in finding that such a denial of such constitutional right was consciously and wilfully made. One is generally presumed to have intended the normal and reasonable consequences of his acts."

We assume, therefore, that this Honorable Court was satisfied that there was direct evidence that the appellant Crews had acted wilfully, or that the court's charge was a fair one without the requested circumstantial evidence instruction.. Indeed, this Honorable Court did characterize the charge of the trial court in the Crews case as being "fair, full and able". (p. 750). *A comparison of the charge of the trial court in the instant case* (R. 310-328) *with the record in this Honorable Court of the Crews case will show that the court's charge in the instant case followed very closely that of the Crews case.*"

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From considering the foregoing argument made by the United States in its brief in the Circuit Court, we have a good concrete illustration of what will be done with the opinion in this case.

The trial court gave its charge, which if sustained, revolutionizes American Criminal Law by substituting presumptions for evidence and thereby putting the burden of proof upon the Defendant. The Circuit Court does not touch on the question in its opinion, and now what is to step the Department of Justice to again put up the same argument in the next case tried, as it has done in this case.

To each of the members of this court your petitioners now call to you as a voice in the wilderness, to apply to their cause, before you, the Golden Rule, which is this case is: "Do not approve the trial of these petitioners, upon a principal of law, by which neither you, nor any other free man, would expect to have his actions judged and measured."

On these bases, your petitioners request that this Court reconsider its action of denying their application for Certiorari and that the order of denying same be set aside and that the Writ of Certiorari then be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

By:_____
Elbert R. Jandt

I, Elbert R. Jandt, Attorney for the Petitioners do hereby certify that this motion for rehearing is presented in good faith and is not presented for the purpose of delay and that the petition is restricted to the matters therein contained.

By:_____
Elbert R. Jandt

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Petition for certiorari denied - same date

SUPREME COURT OF THE UNITED STATES

No. 199.—October Term, 1951.

Bruno A. Koehler and Hugo W. Ackermann, Petitioners, *v.* The United States of America.	On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit.

[October 15, 1951.]

Memorandum by Mr. Justice Jackson, dissenting.

This case involves the power of federal officials to bring state officials to punishment under the remnants of Reconstruction Period legislation.

The state officer in this case, I may observe, richly deserves severe punishment. But the question in the case is one of federal against state power, a line which should not waver with the merits of individuals involved.

The statute, 18 U. S. C. § 242, is vague and general in the extreme. It makes criminal the willful "deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . ."

It is apparent from this case that this statute enables a federal administration to hold over all state officers a threat of prosecution whose vagueness is attested by the fact that this Court cannot decide most issues of deprivation of constitutional right without dissent, and often divides five to four.

The constitutionality of this very statute was recently sustained by a margin so narrow that no opinion could muster a Court majority. Even those who sustained it did so only by an interpretation of "willful" to require more than doing of the forbidden act, saying such "narrower" construction had support in the history of the act.

It was construed to require a specific intent to deprive one of constitutional rights in addition to the evil purpose in doing the act itself. The lower courts were reversed because the issue of specific intent to deprive of a constitutional right was not presented to the jury. *Screws* v. *United States*, 325 U. S. 91.

In this case the trial court properly charged the jury that it must find this specific intent. But it also instructed that "The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well settled rule, which the law applies to both criminal and civil cases, that the intent is presumed and inferred from the result of the action."

This is wrong even by the test of the *Screws* decision. That opinion, referring to the specific intent, said, "And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of petitioner, the weapons used in the assault, its character and duration, the provocation, if any, and the like." *Screws* v. *United States, supra*, at 107. In other words, while the *Screws* decision contemplated the decision of this issue on the whole evidence, the charge below presumed it from a single act. This is not a technical difference. Under the trial court's construction, the Government may merely prove the act and rest—the presumption does the work of evidence. Under the *Screws* case, no such presumption was authorized—the Government would have to produce evidence, circumstantial in most cases, to be sure, from which the jury could reasonably infer the specific intent. That, of course, made the way of the Government harder, but it was in this fact that the *Screws* opinion found assurance that the vague generalities of the statute could not become a menace to civil liberties or to

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state officials. This assurance of protection becomes a hoax if the requirement of specific intent is now to be wiped out with a presumption.

And this is no trivial matter. American criminal law heretofore has had little use for presumptions of criminality. It has required proof beyond a reasonable doubt of all matters that were elements of the crimes. Under the normal charge, which I think the *Screws* opinion contemplated, the jury would be instructed that they must, from all the evidence in the case, be satisfied beyond a reasonable doubt that the specific intent to deprive of a constitutiotnal right was present. Under the decision in this case, they can find a defendant guilty without even considering whether the evidence would show specific intent, for the presumption of law takes the place of the evidence. The burden of proof is on the defendant to overcome the presumption and establish his innocence of intent. If this is not a dangerous and novel importation into American criminal law, I do not recognize danger when I see it.

If this decision is allowed to stand, it is a rather earlier fulfillment of the fears of those of us who dissented in *Screws* than I had anticipated. The dissenting opinion of Judge Russell below seems to me the sound view of the law. I think our duty is to grant the writ.

In not joining this dissent, MR. JUSTICE FRANKFURTER wishes to refer to his views as to the meaning of a denial of certiorari. See *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912.